
OPINION OF THE PUBLIC ACCESS COUNSELOR

TIM O'BRIEN,
Complainant,

v.

MARION COUNTY SHERIFF'S OFFICE
Respondent.

Formal Complaint No.
18-FC-85

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Marion County Sheriff's Office ("MSCO") violated the Access to Public Records Act¹ ("APRA"). The MSCO responded to the complaint through attorney Kevin Charles Murray. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on May 31, 2018.

¹ Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

This case involves the request of an Indianapolis news station for access to the audio of a 911 call related to the discovery of the body in a home on the southeast side of Indianapolis.

On the last day of April, police responded to a home in the 3100 block of Tabor Street after receiving a call that a person was dead inside the residence.

FOX59 WXIN-TV, through Senior Assignment Editor Tim O'Brien, requested the audio recording of the 911 call from the Marion County Sheriff's Office.² On May 3, 2018, the MSCO denied O'Brien's request. The MSCO stated that it would not release the requested 911 audio because the incident was under investigation. The MSCO cited APRA's investigatory records exception as the authority for denial.

On May 31, 2018, as a result of the denial, O'Brien filed a formal complaint against the MSCO with this Office, arguing the denial constitutes an APRA violation. Essentially, O'Brien relies on *Opinion of the Public Access Counselor*, 17-FC-167 (2017) as support that the MSCO violated APRA in this case. Specifically, O'Brien contends that 911 recordings in question were not compiled in the investigation of a crime and therefore do not qualify as investigatory records under APRA.

² Notably, neither party indicated precisely when O'Brien's request was made, which is frequently, if not always, relevant in public records disputes. This is critical in the instant case as at least a partial transcript of the recording was filed with the court in a subsequent criminal case, thus ostensibly eroding the investigatory record exemption altogether.

In its response, the MCSO denies that an APRA violation occurred in this case. Specifically, the agency argues that the 911 call was compiled in the course of the investigation of a crime. Specifically, the MCSO claims that the call, if released, could impair the investigation.

ANALYSIS

The Access to Public Records Act (“APRA”) states that it is the public policy of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.³ Toward that end, providing the people with information is an “essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.”⁴ The Marion County Sheriff’s Office is a public agency for the purposes of the APRA. *See* Ind. Code § 5-14-3-2(n). Therefore, any person has the right to inspect and copy the agency’s public records during regular business hours unless the records are not subject to disclosure under APRA’s mandatory or discretionary exemptions. *See* Ind. Code §§ 5-14-3-4(a) and (b).

The crux of this case is whether withholding the audio of the particular 911 recordings as *investigatory records* complies with APRA. As the parties concede, not all 911 audio recordings would rise to the level of investigatory. Some calls do not entail crimes and some do not call for law enforcement involvement.

³ Ind. Code § 5-14-3-1.

⁴ *Id.*

As noted in *Opinion of the Public Access Counselor*, 17-FC-167 (2017), the current and prior Public Access Counselors have provided regularly published guidance regarding 911 calls as investigatory records. Consider the following from former PAC Heather O’Neal in Opinion of the Public Access Counselor 08-FC-64:

It is my opinion that as a general premise, 911 tapes are part of the daily record of activity. It is conceivable that many 911 calls are taken and handled in a routine matter and often do not involve an alleged crime or lead to an investigation of criminal activity. It is my opinion that those 911 tapes are presumed to be public records subject to disclosure under the APRA. See I.C. § 5-14-3-3.

To be clear, however, the investigatory records of law enforcement agencies or private university police departments may be withheld from disclosure at the discretion of a public agency. *See* Ind. Code § 5-14-3-4(b)(1). Under APRA, *investigatory record* means “information compiled in the course of the investigation of a crime.” Ind. Code § 5-14-3-2(i). Therefore, 911 calls can certainly be compiled in the course of the investigation of a crime; and thus, their release can be withheld at the discretion of law enforcement *if the situation genuinely warrants it*.

This Office has opined on the investigatory record exception to a significant degree and noted that the discretion to withhold a record under Indiana Code section 5-14-3-4(b)(1) is not absolute.

Indiana Code section 5-14-3-9(e) establishes a cause of action that allows any person or organization who has been

denied the right to inspect or copy a public record by a public agency to file an action in the circuit or superior court of the county where the denial occurred. Indiana Code section 5-14-3-9(g)(1)(A) and (B) sets forth an agency's burden of proof in determining whether it properly denied access to a record under APRA's discretionary exceptions, which includes the investigatory records exception. In short an agency must prove that the requested record falls into one of the the discretionary exceptions under APRA and establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit. Conversely, the person requesting the records meets their burden of proof by showing that the denial of access is arbitrary or capricious. Stated differently, if an agency exercises its discretion arbitrarily or capriciously, a petitioner can prevail in that cause of action.

Therefore, this Office instructs law enforcement agencies to exercise discretion if the result of disclosure would: (1) jeopardize an investigation; (2) compromise a legitimate expectation of privacy; or (3) put public safety at risk.

If a police department or sheriff's office can credibly and in good faith cite to one or more of these factors, then exercising discretion to withhold a record may be warranted. The investigatory record exception, however, is not to be an absolute black hole from which a record compiled by law enforcement can never escape the gravitational pull. Nor is it a blanket exception to deny all records from disclosure. The discretion should be exercised on a case-by-case basis and only when strictly necessary to protect the factors above.

Here, the MCSO has asserted the investigation would be compromised by the release of the requested 911 calls. That could very well be the case. This Office trusts that the agency would not make that statement arbitrarily or capriciously and the MCSO is withholding the record for good cause and not merely because the exception is at their disposal.

Make no mistake, the withholding of 911 calls should be an exception and an outlier and not the rule. Scrutinizing them can be a barometer of a law enforcement agency's performance and responsiveness – undoubtedly critical metrics to measure. But every once in a while an audio recording may indeed be so sensitive as to warrant keeping it internal. So long as it does not become routine, withholding a call from time to time may be appropriate.

It is important to note, however, that the invocation of the exception may be moot—depending on date of the request—as it appears the critical portion of the transcript of the call (and perhaps its entirety) had already been filed with the court, thus eliminating any need for invoking the exemption. Nevertheless, without further information from the parties, this is merely speculation.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that, based on the information provided, the Marion County Sheriff's Department did not violate the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', with a large, sweeping flourish at the end.

Luke H. Britt
Public Access Counselor